

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

MANOJ RIJHWANI, et al.,

No. C 13-05881 LB

Plaintiffs,

v.

**ORDER REGARDING THE PARTIES'
THREE JOINT DISCOVERY
DISPUTE LETTERS DATED
JANUARY 23, 2015**

WELLS FARGO HOME MORTGAGE, INC.,

Defendant.

[Re: ECF Nos. 37-39]

Plaintiffs Manoj Rijhwani and Lisa Rijhwani ("Plaintiffs") sued Wells Fargo Bank, N.A. ("Wells Fargo")¹ for its alleged misconduct in relation to Plaintiffs' attempt to get a loan modification and the concurrent foreclosure proceedings on Plaintiffs' property. *See* Second Amended Complaint ("SAC"), ECF No. 1-1 at 1-24.² The parties now have filed three joint discovery dispute letters. *See* First 1/23/2015 Letter, ECF No. 37; Second 1/23/2015 Letter, ECF No. 38; Third 1/23/2015 Letter, ECF No. 39. Upon consideration of the letters and the record before it, the court rules as follow.

I. WELLS FARGO'S DISCOVERY

In the First 1/23/2015 Letter, Wells Fargo asks the court to order Plaintiffs to respond, without objection, to its Special Interrogatories, Set One, and its Request for Production ("RFPs"), Set Two, no later than February 10, 2015. *See* First 1/23/2015 Letter, ECF No. 37. Wells Fargo served the

¹ Plaintiffs erroneously sued Wells Fargo as "Wells Fargo Home Mortgage, Inc."

² Record citations are to documents in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 discovery at issue on Plaintiffs on December 17, 2014. This means that Plaintiffs' deadline to
 2 respond to it was January 16, 2015. *See* Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A). In the letter,
 3 Plaintiffs say they have not responded because one of the two Plaintiffs (Manoj Rijhwani) was
 4 injured in early January 2015, but Plaintiffs fail to explain why they did not seek or get an extension
 5 of time to respond or seek a protective order prior to January 16, 2015, or why the other Plaintiff
 6 (Lisa Rijhwani) could not have assisted with the responses. Plaintiffs nevertheless say that they
 7 agree to respond by Wells Fargo's proposed date of February 10, 2015.

8 The dispute, then, is whether Plaintiffs may object to the discovery. Wells Fargo provides
 9 authority supporting its argument that Plaintiffs' failure to timely respond means that they waived
 10 their right to object. *See* Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory
 11 must be stated with specificity. Any ground not stated in a timely objection is waived unless the
 12 court, for good cause, excuses the failure."); *Richmark Corp. v. Timber Falling Consultants*, 959
 13 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery requests
 14 within the time required constitutes a waiver of any objection."); *Davis v. Fendler*, 650 F.2d 1154,
 15 1160 (9th Cir. 1981) ("Generally, in the absence of an extension of time or good cause, the failure to
 16 object to interrogatories within the time fixed by Rule 33, FRCivP, constitutes a waiver of any
 17 objection."). And although some courts "read into Rule 34 the discretion granted under Rule
 18 33(b)(4) (dealing with interrogatories) to excuse untimely objections to requests for production,"
 19 Cal. Prac. Guide: Civ. P. before Trial § 11:1905 (The Rutter Guide 2015) (citing *Blumenthal v.*
 20 *Drudge*, 186 F.R.D. 236, 240 (D.D.C. 1999)), and other courts have granted relief from such a
 21 waiver "upon a proper showing," *see id.* § 11:1906 (citing *In re Uranium Antitrust Litig.*, 480 F.
 22 Supp. 1138, 1149 (N.D. Il. 1979), Plaintiffs make no effort to argue that they meet such a standard
 23 and in fact do not ask the court to excuse their untimeliness. *See* First 1/23/2015 Letter, ECF No. 37
 24 at 2.³ On this record, then, the court finds that Plaintiffs have waived their rights to object to Wells
 25 Fargo's propounded discovery.

26 Accordingly, the court orders Plaintiffs to provide written responses to Wells Fargo's Special
 27

28 ³ The court found the authorities cited in this sentence on its own; Plaintiffs cited no
 authority in their section of the parties' joint letter.

1 Interrogatories, Set One and its Request for Production, Set Two, without objections, and produce
2 copies of all documents responsive to the requests that are currently within Plaintiffs' possession,
3 custody or control, no later than February 10, 2015.

4 **II. PLAINTIFFS' DISCOVERY**

5 In the Third 1/23/2015 Letter, Plaintiffs ask the court to order Wells Fargo to further respond,
6 without objection, to their Requests for Admissions ("RFAs"), Set One, and their Request for
7 Production, Set Two, no later than February 10, 2015. *See* First 1/23/2015 Letter, ECF No. 39.

8 As an initial matter, the court notes that Plaintiffs' RFAs consist of 405 separate requests,
9 roughly one-third of which appropriately ask Wells Fargo to admit the truth of certain matters
10 related to this action. *See* Fed. R. Civ. P. 36(a)(1) (scope of requests for admission). The remaining
11 two-thirds inappropriately ask Wells Fargo to "state all facts" if the response to the preceding
12 question was not an admission or to "produce all documents" that supported the denial of the request
13 for admission. *Compare id. with* Fed. R. Civ. P. 33(a)(2) (scope of interrogatories) and Fed. R. Civ.
14 P. 34(a)(1) (scope of requests for the production of documents). The court finds that Wells Fargo
15 does not need to further respond to any so-called RFAs that ask Wells Fargo to "state all facts" or
16 "produce all documents." Whether Wells Fargo has to further respond to RFAs that actually seek
17 admissions, or to Plaintiffs' RFPs, is discussed below.

18 As for the remaining RFAs and the RFPs, Wells Fargo argues that it appropriately objected to
19 them and should not have to respond to them because they were not timely served. Plaintiffs' RFAs
20 and RFPs, which were received by Wells Fargo on December 22, 2014, are dated December 12,
21 2014. Plaintiffs say that their counsel placed the envelopes containing the requests into his law
22 firm's mailing system that same day. The proof of service also states that the requests were served
23 by regular mail on December 12, 2014. If this is true, then Wells Fargo would have had to respond
24 to the requests by January 14, 2015, two days before the close of fact discovery. *See* Fed. R. Civ. P.
25 6(a) (calculating time), 6(d) (add three days to response time when service is by regular mail),
26 36(a)(3) (a party must respond to RFAs within 30 days of being served with them).

27 Wells Fargo, however, says that Plaintiffs' position is betrayed by the envelope's postmark,
28 which indicates that the requests were processed as received by the postal service on December 19,

1 2014. If the requests were not delivered to the postal service and mailed until that date, responses to
2 them would not have been due until January 21, 2015, five days after the close of discovery, making
3 them untimely served. Wells Fargo also notes that the proof of service signed by Plaintiffs' counsel
4 states: "I am aware that on motion of the party served, service is presumed invalid if the postal
5 cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing
6 in the affidavit."

7 In light of the conflicting evidence, and with the postal service annual holiday inundation in
8 mind, the court will not find that Plaintiffs' requests were untimely. Wells Fargo must respond to
9 Plaintiffs' Requests for Admissions, Set One (to the extent that they actually seek admissions and
10 not to the extent that they ask Wells Fargo to "state all facts" or "produce all documents"), and their
11 Requests for Production, Set Two, no later than February 10, 2015.

12 **III. MR. TERAN'S DEPOSITION**

13 In the Second 1/23/2015 Letter, Plaintiffs ask the court to order Wells Fargo to either designate
14 Juan Teran as Wells Fargo's deponent for its upcoming Rule 30(b)(6) deposition, provide them with
15 Mr. Teran's contact information so they can serve him with a Rule 45 subpoena, or accept service of
16 a Rule 45 subpoena on his behalf.

17 Mr. Teran, who apparently is a current employee of Wells Fargo in San Antonio, Texas, is
18 important to Plaintiffs' case because he allegedly was designated as their "single point of contact"
19 during their attempts to stave off the foreclosure of their property and to seek a loan modification.
20 Mr. Teran, however, is not a party to the litigation, which means that, if Plaintiffs wanted to depose
21 him, they needed to have served with him a subpoena under Rule 45. They didn't. Instead, on
22 December 26, 2014, they served Wells Fargo with a notice of their intent to depose Mr. Teran on
23 January 6, 2015. And when Wells Fargo objected to the notice on the grounds that Mr. Teran is
24 neither a party to this litigation (and thus must be subpoenaed) nor an "officer, director, or managing
25 agent" of Wells Fargo (such that he could be deposed under Rule 30(b)(1)), Plaintiffs then asked
26 Wells Fargo to require Mr. Teran to testify on its behalf at its upcoming Rule 30(b)(6) deposition.
27 Wells Fargo refused.

28 Wells Fargo was within its rights to object as it did. As one district court has made clear:

1 Only a party to litigation may be compelled to give testimony pursuant to a notice
2 of deposition. If the party is a corporation, it may be noticed pursuant to Rule
3 30(b)(6) of the Federal Rules of Civil Procedure, in which case it must designate an
4 officer, director, . . . managing agent[, or other person who consents] to testify on its
5 behalf. Fed. R. Civ. Proc. 30(b)(6). If the party seeking the deposition wishes to
6 depose a specific employee of the corporation, it may identify a specific officer,
7 director or managing agent to be deposed and notice that person under Federal Rule
8 of Civil Procedure 30(b)(1). However, a corporate employee or agent who does not
9 qualify as an officer, director, or managing agent is not subject to deposition by
10 notice. *Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169
11 (S.D.N.Y.1985). Such employees must be subpoenaed pursuant to Rule 45 of the
12 Federal Rules of Civil Procedure.

13 *Calderon v. Experion Information Solutions, Inc.*, 290 F.R.D. 508, 516 (D. Id. 2013) (footnote
14 omitted); *see* Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:1406.2 (The Rutter Group 2014) (“A
15 subpoena is required to take the deposition of an entity’s nonmanaging agents.”) (citing *Calderon*).
16 If Plaintiffs wanted to depose Mr. Teran under Rule 30(b)(1), it was their burden to show that he
17 was an officer, director, or managing agent of Wells Fargo. *See Calderon*, 290 F.R.D. at 517. And
18 while “this burden is a modest one, and doubts about an individual’s status as ‘managing agent,’ at
19 the pretrial discovery stage, are resolved in favor of the examining party,” *id.*, Plaintiffs do not try to
20 show that Mr. Teran is a managing agent of Wells Fargo. *See* Second 1/23/2015 Letter, ECF No. 38
21 at 3.

22 Wells Fargo also is not required to designate Mr. Teran as their Rule 30(b)(6) deponent. “[I]t is
23 settled law that a party need not produce the organizational representative with the greatest
24 knowledge about a subject; instead, it need only produce a person with knowledge whose testimony
25 will be binding on the party.” *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003); *see*
26 Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:1414 (The Rutter Group 2014) (“The person(s) so
27 designated must be able to testify fully as to the matters designated,” but “[a] party need not produce
28 the person most knowledgeable about the matters designated.”) (citations omitted). Thus, even
29 though Mr. Teran may have a lot of knowledge about Plaintiffs’ deposition topics, all Wells Fargo
30 has to do is designate a deponent who can fully testify about those topics.

31 The court also rejects Plaintiffs’ request that the court order Wells Fargo to accept service on his
32 behalf. Plaintiffs have cited no authority for such relief. Rule 45 requires a subpoena to be
33 “delivered” to the named person, and most courts have interpreted that word to require personal

1 service. *See* Fed. R. Civ. P. 45(b)(1); Cal. Prac. Guide: Fed. Civ. P. before Trial § 11:2271-72 (The
2 Rutter Group 2014) (citations omitted). And while counsel often stipulate to produce their client's
3 employees without requiring the service of subpoenas, *see* Cal. Prac. Guide: Fed. Civ. P. before
4 Trial § 11:2229 (The Rutter Group 2014), that did not occur here, and Plaintiffs have not provided
5 the court with any authority that would suggest that Wells Fargo has to accept service on Mr.
6 Teran's behalf. Plaintiffs statement that there are "at least seven Juan Teran's residing in San
7 Antonio, Texas" does not change this outcome.

8 That said, Mr. Teran appears to be central to this case, which would make him the kind of person
9 Wells Fargo ought to (and may) have listed in its initial disclosures. *See* Fed. R. Civ. P.
10 26(a)(1)(A)(i). This also means that his address and telephone number, if known, should have been
11 included, too. *See id.* The Federal Rules of Civil Procedure also require parties to supplement their
12 initial disclosures when they discover information at a later date. *See* Fed. R. Civ. P. 26(e)(1)(A).
13 The court also believes that, while Plaintiffs perhaps could have discovered Mr. Teran's contact
14 information through other means (e.g., an interrogatory, the use of an investigator, etc.), it seems
15 like a waste of time at this point of the litigation to require Plaintiff to jump through such hoops
16 when Wells Fargo can (and should have, if it didn't) provide it now. The court thus orders Wells
17 Fargo to provide it (if known) to Plaintiffs by February 2, 2015.

18 Accordingly, the court will not require Wells Fargo to designate Juan Teran as Wells Fargo's
19 deponent for its upcoming Rule 30(b)(6) deposition or accept service of a Rule 45 subpoena on his
20 behalf. It must, however, provide them with Mr. Teran's contact information.

21 **IT IS SO ORDERED.**

22 Dated: January 28, 2015



23 LAUREL BEELER
24 United States Magistrate Judge
25
26
27
28